No. 373.

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JAMES H. McKENNEY,
Clerk.

Brf. of Humphrey & Davies for P.

No. 373.

Supreme Court of the United States,

OCTOBER TERM, 1900.

Filed Nov. 26, 1900.

DANVILLE WATER COMPANY,

VERSUS

CITY OF DANVILLE.

Error to Supreme Court of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

ALEXANDER POPE HUMPHREY,
W. W. DAVIES,
Attorneys for Plaintiff in Error.

W. W. DAVIES,
Of Counsel.

JOHN P. MORTON & COMPANY, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

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CITY OF DANVILLE, . . . *Defendant in Error.*

Error to Supreme Court of Illinois.

BRIEF FOR PLAINTIFF IN ERROR.

May it please the Court:

On September 16, 1895, the Danville Water Company brought suit in the Circuit Court of Vermilion County, Illinois, against the City of Danville for the recovery of certain fire-hydrant rentals contracted for between the parties by an ordinance of the City of Danville passed and approved November 9, 1882, and one of May 1, 1883, and other minor and consistent ordinances mentioned hereafter. As a defense the City of Danville interposed pleas setting up rates fixed by virtue of an ordinance of the City of Danville of January 19, 1895, abrogating and setting aside the rates established by the ordinances of 1882 and 1883, and those passed subsequently to them and consistently with them. To such pleas the Danville Water Company filed demurrers, which were sustained. Later, on January 10, 1896, an exactly similar action was filed in the same court between the same parties for the same amount of indebtedness under the same ordinances and cause of action, with only the difference that the rentals sued for were for a later quarter of the year.

To this last action the City of Danville filed the same pleas

and also certain other pleas. To all these pleas demurrers were filed and sustained. From these judgments appeals were prosecuted to the Supreme Court of Illinois. That court held that the judgments were erroneous in sustaining demurrers to the first two pleas, that the third had been abandoned, and that the court below was right in its decision on pleas four and five. On return of the case, the Circuit Court followed the mandate of the Supreme Court and overruled the demurrers to the first two pleas and sustained demurrers to the others. Appeals were prosecuted from these judgments and they were affirmed, the two causes having been in this last hearing consolidated by the Supreme Court of Illinois. (R. 104.) A writ of error having been prosecuted to this judgment, the question before this court is the validity of the judgment of the Supreme Court of Illinois.

STATEMENT.

This case arises upon questions based upon the action of the Circuit Court of Vermilion County, Ill., in following the judgment of the Supreme Court of Illinois in overruling demurrers filed by the Danville Water Company to the sufficiency of the pleas of the City of Danville. From the judgment of the Supreme Court of Illinois, in sustaining the action of the Circuit Court of Vermilion County, this plaintiff in error has taken a writ of error to this court.

On November 9, 1882, the Danville Water Company was constituted a corporation under the laws of Illinois, with the characteristics and powers of a water company to contract and be contracted with, and to supply the City of Danville, Ill., and its inhabitants, with water for municipal and private uses. On the same day, November 9, 1882, the council of the City of Danville duly and regularly passed, and its mayor duly and regularly approved, an ordinance entitled, "An ordinance providing for a supply of water to the City of Danville and its inhabitants, authorizing the Danville Water Company to construct and main-

tain water-works, contracting with said company for a supply of water for public use, and giving said city an option to purchase said works."

This ordinance is set out in full in the printed Transcript. (R. 5.) Section 14 of this ordinance terms the ordinance "*a contract*" with the Danville Water Company upon the acceptance of the ordinance, in writing, by the Danville Water Company, within ten days from the passage and publication of the ordinance. The written acceptance of the ordinance and its terms and provisions was regularly made in due time and form by the Danville Water Company. By Section 8 of this ordinance (R. 9) the City of Danville rented of the Danville Water Company for the term of thirty (30) years, one hundred (100) fire-hydrants, with proper water service therefrom, at the annual rental of seventy-five dollars ($75.00) per hydrant. It was further agreed in the same section of the same ordinance (R. 10) that the City of Danville should pay sixty-two dollars and fifty cents ($62.50) per hydrant yearly during the unexpired portion of the thirty years, for forty (40) additional fire-hydrants, which the Danville Water Company might put in successful operation, and for all fire hydrants in excess of one hundred and forty (140), under similar provisions, the annual rental of fifty dollars ($50.00) per hydrant.

These rentals were, by the terms of the ordinance, to be paid in quarterly installments. Subsequently, and on various dates (R 4-31) ordinances, in number fifteen (15), were passed, published and duly approved on the part of the City of Danville touching matters of construction and detail not material in the discussions of the issues in this case. In two of these ordinances, the ordinances of June 28, 1894, and October 18, 1894 (R. 27, 31), the fire-hydrant rate, for *certain hydrants*, was reduced to $40.00 per annum per hydrant. In these last two ordinances there were provisions to the effect that they should be part of the binding contract between the City of Danville and the Danville Water Company when they should be accepted in writing

within a given time by the Danville Water Company. Such written acceptance was made in proper form and time.

This rate of $40.00 per hydrant was a special arrangement, and was consented to in writing and accepted by the Danville Water Company. The Danville Water Company erected and put in satisfactory operation one hundred and fifty-eight (158) fire-hydrants, under the terms and provisions of the original ordinances of November 9, 1882, and May 1, 1883, and those above mentioned as subsequently enacted, from time to time, and accepted in writing properly by the Danville Water Company. For the fire-hydrant rentals established and recognized in the original ordinances of November 9, 1882, and May 1, 1883, and in those ordinances following, the Danville Water Company brought suit in the Vermilion County Circuit Court against the City of Danville for the sum of $2,620.62, this amount being the total rental of the 158 fire-hydrants for May, June, and July, 1895. In the other action suit was brought by the Danville Water Company against the City of Danville for hydrant rentals accruing in August, September, and October, 1895. Both causes were based upon the claim of the Danville Water Company against the City of Danville, arising under the contract embodied in the original ordinances of November 9, 1882, and May 1, 1883, and subsequent minor ordinances accepted in writing in due form by the Danville Water Company.

The combined suits are for the hydrant rentals during the two quarters embraced in May, June, July, August, September and October, 1895, and are based upon the rates fixed by the original ordinances and those subsequent thereto just mentioned. The defense, embodied in the pleas of the City of Danville in the actions in the Circuit Court of Vermilion County, was that on January 19, 1895, the council of the City of Danville had abrogated and abolished the former and original rates by an ordinance passed under and by virtue of an act of the General Assembly of the State of Illinois, approved June 6, 1891, and in force July 1, 1891, entitled "An act to enable cities, towns, and

villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company, or corporation to any such city, town or village and the inhabitants thereof." By this abrogating ordinance (R. 35), claiming to be based on and legalized by the Act of the General Assembly in force July 1, 1891, the City of Danville attempted to cut down and reduce the fire-hydrant rentals for the first 140 hydrants to the uniform annual rental of $50.00 per hydrant, and for all additional hydrants to $40.00 per hydrant and no more. This last named ordinance also attempted to fix the rates for water for the public drinking fountains at $5.00 per annum per fountain, and for sewer flushing purposes at 5 cents per 1,000 gallons and no more.

The pleas of the City of Danville filed in the Circuit Court set up the validity of this rate-reducing ordinance against the Danville Water Company in its declaration for indebtedness under the hydrant rates fixed in the original ordinances of November 9, 1882, and May 1, 1883, and the City of Danville tendered in its pleas as full satisfaction the reduced amount of the rentals under the rate-cutting ordinance of January 19, 1895. (R. 35.) The demurrers before the Circuit Court of Vermilion County, Ill., and later on appeal before the Supreme Court of Illinois, filed by the Danville Water Company, raised the question against these pleas of the city of Danville as to the validity of the ordinance of January 19, 1895, under the act of the General Assembly of Illinois, approved June 6, 1891, under the Constitution of the United States.

The demurrers operate by attacking the pleas setting up the rate-reducing ordinance in contravention of the Federal Constitution, and attacking the Act of the General Assembly of Illinois, approved June 6, 1891, upon the same ground. The grounds of attack, set up by the demurrers, are that both the ordinance of January 19, 1895, and the Act of the General Assembly, approved June 6, 1891, are contrary and repugnant to Section 10, Art. 1, Constitution of the United States, which for-

bids any State to pass a law impairing the obligation of a contract, and, further, that they are both repugnant to Sec. 1, 14th Amendment to the Constitution of the United States, which provides that no State shall deprive any person of his property without due process of law, nor deny to any within its jurisdiction the equal protection of the law. The affirming of the judgment of the Circuit Court of Vermilion County, overruling the demurrers of the Danville Water Company to the pleas of the City of Danville, by the Supreme Court of the State of Illinois, is assigned as error, and the decision of the Supreme Court of Illinois in upholding the ordinance of January 19, 1895, and denying the rights of the Danville Water Company under the original ordinances of November 9, 1882, and May 1, 1883, as vested rights, and the decision of the Supreme Court of Illinois to the effect that there was no vested contract to pay the rates charged by the Danville Water Company to the City of Danville, are errors repugnant to the Constitution of the United States.

The actions by the Danville Water Company are based on the indebtedness of the City of Danville arising under the original ordinances constituting a contract and vested rights as to hydrant rentals. The defense is made by the pleas of the City of Danville setting up the abrogating ordinance of 1895. The demurrers attack the validity of such abrogating ordinance and the act under which it was passed. Thus is the issue of the validity of the act and ordinance made.

Contentions of Plaintiff in Error.

As briefly as possible the Danville Water Company, plaintiff in error, contends:

1. That the original ordinance of the Council of the City of Danville of November 9, 1882, supported and recognized by the ordinance of May 1, 1883, and other minor and consistent ordinances (R. 5–31), created in the Danville Water Company abso-

lute, vested, contract rights to charge the defendant in error certain fixed maximum fire-hydrant annual rentals named, specified, and established in said original ordinance and other consistent ordinances above mentioned.

2. That the City of Danville had the right and power to contract for thirty years for the hydrant rentals contended for by the Danville Water Company as established in the original ordinances of November 9, 1882, and May 1, 1883, and those subsequent thereto.

3. That the City of Danville did contract with the Danville Water Company by means of the ordinances of November 9, 1882, and May 1, 1883, and the other minor subsequent ordinances (R. 5-31) for the payment of fixed rentals for fire-hydrants and municipal water supply, and that such ordinances created, as to such fixed rentals, in the Danville Water Company, vested rights.

4. That the attempt of the City of Danville, by its ordinance of January 19, 1895, under the Act of June 6, 1891, is illegal and void, and contrary to the Constitution of the United States, in that it attempts to reduce the rentals contracted for, and thereby deprive the Danville Water Company of its vested contractual rights, and deprive it of its property in abrogation of such rights and without due process of law, and without equal protection of the law.

5. That the ordinance of the City of Danville of January 19, 1895, and the Act of the General Assembly of Illinois of June 6, 1891, in so far as they attempt to reduce and give authority to reduce the contract rates established by the original and minor ordinances, are void, as being contrary to the Constitution of the United States, in that they deprive the Danville Water Company of its vested rights and take its property without due process of law, and deprive it of the equal protection of the law.

6. That the decisions of the Supreme Court of Illinois in Danville Water Co. v. City of Danville, 178 Ill. 229, and Same v. Same, 180 Ill. 235, which embody the reasonings supporting

the decision of this case, as declared by the opinion of the Supreme Court of Illinois (R. 104), are erroneous throughout, in that they set up principles in violation of vested rights, and contrary to the guarantee of the equal protection of the law, and to the exercise of due process of law in depriving a person of property.

ARGUMENT.

Counsel for the City of Danville take up the six contentions above offered and argue them *seriatim*.

1. On the proposition that the water company had vested rights in the rates of rental conferred by the original ordinances of the city, counsel submit that if the water company did not have a contract, it had nothing, and if such contract did not create a vested right, it created nothing.

A contract made by a municipality by contracting ordinance with a person or corporation for water covering a period of thirty years, having about fifteen years more to run, is valid, under the decisions of the federal courts, as a *business* contract. A contract for a certain term for the supply of a certain article at a certain price creates a *vested* right when the objects of the contract are lawful.

Illinois Trust Co. v. City of Arkansas City, 22 C. C. A. 171–181.

City of Walla Walla v. Walla Walla Water Co., 172 U. S. 1.

Defiance Water Works Co. v. City of Defiance, 90 Fed. 753.

Santa Anna Water Co. v. Beuna Ventura, 56 Fed. 343.

Insulated W., etc., Co. v. Baltimore, 13 C. C. A. 378.

Los Angeles City Water Works Co. v. City of Los Angeles, 88 Fed. 721.

Fergus Falls Water Co. v. City of Fergus Falls, 65 Fed. 586.

A strong case on this subject, and one which has been extensively quoted and approved, is the case of the Illinois Trust Co. v. the City of Arkansas City, 22 C. C. A. 171–181.

Judge Sanborn, in writing the opinion of the court, page 186, says:

"But it is insisted that this contract is beyond the powers of the city, and void, because it grants the right to use the streets of the city for the water company, and promises to pay rental for the hydrants for 21 years. The proposition on which this contention rests is that the members of the City Council are trustees for the public; that they exercise legislative powers; and that they can make no grant and conclude no contract which will bind the city beyond the terms of their offices, because such action would circumscribe the legislative powers of their successors, and deprive them of the right to their unrestricted exercise as the exigencies of the times might demand. There are two reasons why this proposition can not be successfully maintained in this case:

"First, It ignores the settled distinction between the governmental or public, and the proprietary or business powers of a municipality, and erroneously seeks to apply to the exercise of the former. A city has two classes of powers — the one legislative, public, governmental, in the exercise of which it is a sovereignty, and governs its people; the other proprietary, quasi private, conferred upon it, not for the purpose of governing its people, but for the private advantage of the inhabitants of the city and of the city itself as a legal personality. In the exercise of the powers of the former class it is governed by the rule here invoked. In their exercise it is ruling its people and is bound to transmit its powers of government to its successive sets of officers unimpaired. But in the exercise of the powers of the latter class it is controlled by no such rule, because it is acting and contracting for the private benefit of itself and its inhabitants, and it may exercise the business powers conferred upon it in the same way, and in their exercise it is to be governed by the same rules that govern a private individual or corporation. Dill. Mun. Corp. (3d ed.) 66, and cases cited in the note; Safety Insulated Wire and Cable Co. v. City of Baltimore, 13 C. C. A. 375, 377, 378, 66 Fed. 140, 143, 144; San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, 468, 469; Com. v. City of Philadelphia, 132 Pa. St. 288; New Orleans Gas Light Co. v. City of New Orleans, 42 La. Ann. 188, 192; Tacoma Hotel Co. v. Tacoma Light and Water Co., 3 Wash. St. 316, 325; Wagner v. City of Rock Island, 146 Ill. 139,

154, 155; City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114, 126; City of Indianapolis v. Indianapolis Gas Light and Coke Co., 66 Ind. 396, 403; Read v. Atlantic City, 49 N. J. Law, 558, 562. In contracting for water-works to supply itself and its inhabitants with water, the city is not exercising its governmental or legislative powers, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city itself and its denizens. 1 Dill. Mun. Corp., paragraph 27; City of Cincinnati v. Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire and Cable Co. v. City of Baltimore, 13 C. C. A. 375, and cases cited under it."

The language of the grant of power in that case was "full power and authority to contract for and procure water-works to be constructed for the purpose of supplying the inhabitant of such cities with water."

The court, in the opinion on page 181-2-3, holds that under that grant of power the mayor and council were vested with the right to make such contracts for such term as, in their discretion, they thought proper, and hold that there was nothing in the record to show that the mayor or council had exceeded their authority or abused their discretion when they fixed the term of the contract at twenty-one years.

In the case of the Walla Walla City v. Walla Walla Water Co., 172 U. S. 1, the Arkansas City case was cited and approved by this Court.

We will not quote further at length from these authorities, but invite the Court's attention to them and to the State decisions cited and approved by Judge Sanborn in his opinion. The general weight of authority in the State courts is that contracts such as are in issue in this case are good.

It can be confidently stated that the modern decisions on this question in all courts are to the effect that these contracts are good, and that in entering into such contracts the officers of a municipality stand in substantially the same position as the directors of a private corporation.

As shown (R. 62), the original ordinance of the city of November 11, 1882, in Sec. 8 reads as follows:

> "In consideration of the benefits which will be derived by the said city and its inhabitants from the construction and operation of the said water-works, and in further consideration of the water supplied hereby secured for public uses, and as the *inducement* to said water company to accept the provisions of this ordinance and *contract*, and to enter upon the construction of said water-works, the right and privileges hereby granted to and *vested* in said water company shall remain in force and effect for thirty years from the passage of this ordinance; and for the same consideration and as the same inducement, the City of Danville hereby rents of the Danville Water Company for the uses hereinafter stated one hundred fire-hydrants of the character hereinafter described for and during the term of thirty years from the passage of this ordinance, and agrees to locate them promptly along the line of the street mains, on demand of said company, and on submission by it to said city of a plan of the location of said street mains, and agrees to use the said hydrants carefully and to pay said water company for any injury which may happen to any of them when used by any officer, servant or member of the fire department of said city, and agrees to pay rent for said one hundred hydrants at the rate of seventy-five dollars each per year, and agrees to pay during the unexpired term of said ordinance and privilege, for any additional fire-hydrants which the city may hereafter locate, at the rate of sixty-two and fifty one-hundredths dollars each per year; all of which sums shall be paid by said city to said water company, beginning from the dates when each of such hydrants shall be put into successful operation, in quarter-yearly installments on the first days of February, May, August, and November of each year, terminate upon the expiration of said term of thirty years, or upon the purchase of said works and their privileges and property by the said city."

It is perfectly plain by the terms of this ordinance, and this section just quoted, that the city was holding out certain fixed prices for municipal water service for a fixed period of years in consideration of the benefits which would be derived by the city and its inhabitants from the construction and operation of water-

works. The fixed rates for a fixed period of years are offered as a consideration for a contract, and the ordinance and section use these words: "As an *inducement* to said water company to accept the provisions of this ordinance and *contract*, and to enter upon the construction of said water-works, the right and privileges hereby granted to and *vested* in said water company shall remain in force and effect for thirty years from the passage of this ordinance." The section and ordinance then go on, as the Court will see, in the usual language of contracts, and fix definitely and certainly the maximum hydrant rentals to be charged by the water company. It must be remembered that the water company had not begun the construction of its plant at the time this ordinance was passed, but the ordinance was passed by the city, and the contract made as an inducement which should operate in bringing about the construction of a plant in the city. Section 14 of this ordinance has plainly the intent to give to the ordinance not only the spirit but the very form itself of a contract, creating *vested* rights. This Section 14 reads as follows:

> "*This ordinance shall become binding as a contract on the said City of Danville in the event that the said Danville Water Company shall, within ten days from the passage and publication of this ordinance, file with the city clerk of said city its written acceptance of the terms, obligations, and conditions of this ordinance, and upon such acceptance this ordinance shall constitute the contract, and shall be the measure of the rights and liabilities of the said city and of the said water company.*"

There could be no words in all our language more carefully and expressly selected to convey the idea of the establishment of a contract between the city and the water company. If the city has no ordinary business contracting power by which it can furnish itself with necessities for the public good by contract, then the very life of a municipal corporation, in so far as benefits to the public are concerned, is gone. It is necessary to the very existence and progress of such a municipal corporation that it have the power to make contracts to supply itself with water for

public uses. If this be not true, then persons and corporations in the business of supplying municipal necessities must be at the mercy and caprice of the city government to establish any rate they may choose, or such person or corporation must refuse to supply the city with water or other necessities under the disadvantage of the city having no definite, fixed, legal, and reliable contracting power. Under this head we are discussing the existence of *vested* rights and the fixed maximum rates in favor of the water company. If there was a contract created by the above mentioned ordinance, then that contract had *rights* under it, and those rights were *vested rights*, or no rights at all. The time during which those rights should exist was a part of the essence of the contract, and the definite hydrant rentals were also a part of the essence of that contract. It must be remembered that we do not contend that the water company had exclusive rights in the city as against municipal water-works or water-works erected by other corporations. We simply contend that the city created a fixed price for water furnished to it, and a fixed time during which the water company should enjoy such price of water furnished.

On May 1, 1883, the city council passed, and the mayor approved, and on June 8, 1883, there was published, another ordinance carrying out and amending the last named ordinance. (R. 65.) This ordinance intensifies the original ordinance by means of a ratification of the original ordinance, and refers to the original ordinance as "A *contract* existing between the City of Danville and the Danville Water Company," as is shown in Section 2 of this amending ordinance. The first section of this last named amending ordinance shows on its face that the water company has commenced the construction of its plant, and it is a further inducing contract in all of its terms. The water company began construction under the original contract expressed in the original ordinance, and made its investment of capital thereon. It continued its construction under the ratifying, amending, and conforming ordinance, and con-

tinued to invest its capital in the construction of the plant. There are fifteen other ordinances which reaffirm the contract of the original ordinance and provided, from time to time, for the construction of hydrants as the city needed them at the price agreed on in the original ordinance. Two of these ordinances, namely, the ordinance passed August 9, 1894, and the ordinance passed October 18, 1894, fix a rate of $40.00 for specified hydrants. The water company, for these particular hydrants, by its written consent, agreed to the price suggested in the ordinances, but the ordinances themselves, and the consent thereto, only embraced these *special* hydrants, and did not touch or affect the rates fixed for any other hydrants. There is, however, no contention over this matter, as the claim of the water company as to these hydrants, specially provided for, is in strict conformity with the water company's cause. Certainly, then, we may place this much behind us in this argument when we say that it must be conceded that the wording and terms of the original ordinances are in strict conformity with the expressions of the binding *business contract* conveying *vested rights.*

2. We will now discuss the right and power of the city to contract with the water company for the maximum hydrant rentals contended for by the water company as fixed in the original ordinances, and those subsequent thereto and consistent therewith. The Danville Water Company was incorporated in 1882. There were in force at the time the acts of the General Assembly of Illinois, approved April 9, 1872, and April 10, 1872, both in effect on the same day, July 1, 1872. (1 Starr and Curt. Stat., pages 545 and 508.) The first of these acts provided as follows:

> "That in all cities . . . where water-works may hereafter be constructed by an incorporated company, the city . . . authorities in such cities . . . may contract with such incorporated company for a supply of water for public use for a period not exceeding thirty years. Any such city . . . so contracting may levy and collect a tax on all taxable property within such city . . . to pay for the water so supplied." (1 Starr & Curt. Stat., p. 545.) "The city

council . . . shall have the power to provide for a supply of water . . . by the construction and regulation of . . . water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years."

The discussion of the right and power of the city to contract for the maximum hydrant rentals for thirty years involves the argument, just offered above, touching the construction of those acts under the wording and terms used therein. There can be no doubt but that the acts contemplated the erection of water-works in the cities and towns of Illinois, and that the acts intended that such cities and towns should *contract* for water furnished them, and that their contracts should be formed by means of ordinance, duly passed and approved.

We will not take the time of the court by repeating the argument which we have already used in regard to the construction of the words and terms of these acts. What we have already said we deem sufficient to show the right and power of the city to contract for a definite consideration, such as *definite* rates, by ordinance, for the water to be furnished.

Both the city and the water company complied with these acts by the passage, approval, and acceptance of the original ordinance, which fixed the rates and named the consideration of the contract embodied in that ordinance. No modification of that ordinance and of its contract was ever made afterwards except by the acquiescence and written consent of the water company. It is not, however, contended anywhere that the water company ever abandoned in any respect its fixed rights under the original ordinance, except in the two ordinances passed in 1894, where the water company, of its own free-will and accord, for its own reasons, in writing, consented to a rate of $40.00 rental for *certain specified* hydrants. Of course, then, no discussion along this line is necessary. We submit the acts in effect July 1, 1872, to the inspection of this Court, and respectfully

contend, under what has already been said regarding the construction of those acts, that they confer absolute power and right on the city by ordinance to *fix* the maximum hydrant rentals for a period of thirty years. We may notice briefly, however, in passing, that in both of these ordinances are words used which employ all the essentials and characteristics of the contract.

In the first of these ordinances the words "*May contract with such incorporated company for a supply of water*" are used. When persons and corporations are empowered to make contracts, it is supposed that they have the power to negotiate concerning all the terms of a contract. We repeat that the most important part of a contract is a *definite consideration*, and that fixed hydrant rentals can be the only *definite consideration* conceivable. The Supreme Court of Illinois, in its above referred to opinions, says that the clause in the City and Village Act "*For a period not exceeding thirty years,*" qualifies only the words "*Construct and maintain the same.*" The original ordinance, contended for by the water company, was passed and accepted at the time of the *construction* of the plant. If the words relating to the thirty years qualify only the words "*Construct and maintain,*" then the original ordinance is in conformity with the City and Village Act, and no subsequent ordinances modifying it or abrogating it can be in conformity with such act, because they would not relate to the *construction* of the plant, that being a matter of the distant past. If the interpretation of the Supreme Court of Illinois as to the wording and meaning of the City and Village Act is correct, then it must be true that only one ordinance could fix the rates, and *that must be an ordinance relating to the word "construct."* Without further comment, these acts giving towns and cities the rights and powers we contend for are left for the construction of this Honorable Court.

3. We shall now discuss the *fact* of the city actually contracting by its original ordinance, and subsequent consistent ordinances, with the water company, for the maximum rentals for fire

hydrants, and the question of vested rights arising under such a contract. We have gone over the matter of whether or not the city had the right and power under the acts in effect July 1, 1872, by ordinance, to contract with the water company for maximum rates. If there was such a right and power in the city, and that power and right were to be exercised by means of ordinance, then the orignal ordinance of 1882, and those consistent therewith, carry out the provisions of the means given for contracting. The existence of the original ordinance is a *fact*. The character of the power therein is the only matter under discussion. If the city had the power to contract, and did contract for definite rates for a period of thirty years, and the water company accepted such a contract, then both the water company and the city are bound thereby, and the water company had rights thereunder. Those rights are not indefinite rights, but they are definite rights, subject to no whim or caprice of the city authorities, and they are *vested rights*. If they be *vested rights*, they are sacred under the Federal Constitution.

4. We submit the proposition that the city by ordinance of January 19, 1895, attempted, illegally, and without right and power under the constitution, to deprive the water company of its vested rights. If such rights were vested rights, then any attempt, by any ordinance, authorized by any acts of the legislature, was an attack upon that which is sacred under the constitution, and that such an attempt was an attempt to take property without due process of law and without equal protection of the law.

5. We would attack the validity of the ordinance of January 19, 1895, which abrogates the established rates, and we also attack the act of the General Assembly of Illinois of June 6, 1891, in attempting to give authority to the city to abrogate the original ordinance as a contract between the city and the water company. If the rights of the water company were vested rights, then any attempt by ordinance to take away those rights was illegal. If the rights were vested rights, then any

attempt by the legislature through an enactment to give authority to a city council to attack and take away such rights was also illegal under our constitution.

We deem it unnecessary to enlarge upon this and the three preceding sections of our contentions.

6. In discussing our last contention, there can be no argument stronger than the argument set forth in the dissenting opinion of three of the judges when these cases were before the Supreme Court of Illinois. Justices Phillips, Craig, and Cartwright dissented from the opinions of the Supreme Court of Illinois in these two cases. Judge Phillips wrote the dissenting opinion. We deem it proper to set forth this dissenting opinion, and we take the liberty to do so in the immediately following portion of this brief:

DISSENTING OPINION BY PHILLIPS, J.

"I do not concur with the reasoning or conclusion reached in the opinion adopted by the majority of this court.

"On this record two questions are presented for adjudication in this court. First, is ordinance No. 517 a valid enactment, and if so, it was error to sustain the demurrer to the first and second pleas; and second, whether the allegation to the declaration showed a valid promise by the city for the payment of the rental for 158 hydrants in the manner authorized by law. By Section 1 of Article 10, Chapter 24, it was provided: 'The city council or board of trustees shall have the power to provide for the supply of water by the boring and sinking of artesian wells, or by the construction and regulation of wells, pumps, cisterns, reservoirs, or water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years; also to prevent the unnecessary waste of water; to prevent the pollution of the water and injury to such wells, pumps, cisterns, reservoirs, or water-works.'

"This section was in force at the time of the adoption of the original ordinance by which the contract was made for the one hundred hydrants at $75 each, and the additional

hydrants at a specified rate. The right is granted by the foregoing section to contract for a supply of water for a period of thirty years, and the right to contract for a supply necessarily authorizes the right to fix the rate at which the supply shall be furnished. By the provisions above quoted the State invested the municipality with power to make and contract for a supply of water for a period of thirty years, and it would be difficult to comprehend the meaning of terms authoring a contract to be made for a supply of water to be furnished without including therein the right to fix the price at which it should be furnished. This power conferred by the legislature sanctions a particular act and authorizes it to be done. Where a contract is made to accomplish that act thus sanctioned it must be held valid. The power of the State in regulating, governing, and conferring power on municipalities is supreme, but where it confers a power with reference to a contract, and that power is once exercised, it is subject, like other legislative powers, to the authority of the State and Federal Constitutions; and when it invests a corporation which derives its power from the State with the power to make a contract and that power is exercised, the legislature is thereafter concluded from annulling or rendering invalid such a contract. Such a contract is only subject to judicial construction and is sacred from interference by the legislative power. Such a contract, made by a municipality under the power conferred by a State legislature, can not be impaired, and has thrown around it positive restrictions of the Federal and State constitutions. (*Citizens' Water Co.* v. *Bridgeport, etc., Co.*, 55 Conn. 1; *Rockland Water Works Co.* v. *Camden*, 80 Me. 544; *N. O. Water Works Co.* v. *Rivers*, 115 U. S. 74; *St. T. W. W. Co.* v. *N. O. W. W. Co.*, 120 U. S. 64.)

"In a contract running for a period of years for the supply of water, a different rule is invoked from that which occurs in the case where a contract is made for lighting a city. In the one case the legislature has conferred the power on the municipality to contract for a period of years, in the other it is silent as to such power. The municipality having no power other than that granted by the legislature, is limited in restriction to the powers granted and known conditions of most of the cities and villages of the State of Illinois, which necessarily must exercise the power of providing a means of supplying their inhabitants with water, and could not do so without conferring privileges and entering into contracts in many cases, and the legislature, deeming the

power to contract for a period of years necessary to secure such supply of water, by the enactment above quoted exercised a power not restricted by the constitution of the State of Illinois, and conferred upon the municipality a right to so contract for a term of years, and the necessary construction of the section heretofore quoted is that it conferred the power to contract for a supply of water and fix the price thereof for a period of thirty years. Subsequent to that enactment, by an act approved July 1, 1895, entitled 'An Act to enable cities, incorporated towns and villages to contract for a supply of water for public use, and to levy and collect a tax for the water so supplied,' it was provided that 'in all cities, incorporated towns and villages where water works have been or may be hereafter constructed by any person or incorporated company, the city, town or village authorized in such statute, incorporated towns and villages may contract with such person or incorporated company for the supply of water for public use for a period not exceeding thirty years.'

"No reasonable construction can give the former section with reference to the period to contract a different construction from that of the latter act, and both authorize the fixing of a price at which the water supplied shall be furnished. It was not error to sustain the demurrer to the first and second pleas.

"The contention that the declaration does not set forth a binding promise because it contains no averment that before or at the time of making the contract a provision for the collection of a tax to meet payments as they might fall due was provided for, or that no appropriation had been made before or at the time of making contract, can not be sustained. The constitutional prohibition against going into debt beyond the amount limited by the constitution does not prevent the making of contracts for supplying an article of daily consumption at a stipulated price, to be paid for and which was paid for by annual appropriations levied and collected for that purpose at stated intervals after delivery, and that does not create an indebtedness within the meaning of the constitution. (*City of East St. Louis* v. *East St. Louis Gas Light and Coke Co.*, 98 Ill. 415.)

"The sufficiency of the declaration in stating the cause of action must be held well pleaded when it violates no provision of the ordinance of the city or the constitutional laws of the State of Illinois, and if the city has the power to make a contract for a period of thirty years under the legislation

of the State, and that legislation is not unconstitutional, then it must be held that the declaration states a cause of action, and the power having been conferred upon a municipality to enter into a contract for such a length of time for an article of daily consumption, it is not the incurring of an indebtedness which requires an appropriation made providing for the whole period of thirty years, as to so hold would place a restriction on the power of municipalities to contract, and would obstruct public wants, retard improvements, and not be consistent with the spirit and meaning of the act. It was not error for the court to refuse to carry the demurrer back to the declaration, in my opinion."

Craig and Cartwright, JJ., also dissenting.

We must inquire now, what are the contentions of the city against the claim of the water company for the payment of the hydrant rentals expressed in the original ordinances and in the subsequent and consistent ordinances. The contentions are that on January 17, 1895, the city council passed, and on January 19, 1895, the mayor of the city approved, an ordinance (R. 35) rearranging and refixing the hydrant rentals at a lower figure, and that such ordinance was in conformity with an Act of the General Assembly of Illinois of June 6, 1891 (Hurd's Stat., p. 305, Sec. 267*f*), entitled "An act to enable cities, towns, and villages incorporated under any general or special law of this State to fix the rates and charges for the supply of water furnished by any individual, company or corporation to any such city, town or village or the inhabitants thereof." The city contended that under such ordinance the city owed as rentals a sum less than that contended for by the water company under the original and subsequent and consistent ordinances. Another contention made by the city was that it had not by the ordinances set up as the basis of the water company's action nor by any other ordinance or ordinances or in any manner, at any time, before or after the indebtedness claimed by the water company, made any provision for the collection of a direct annual tax sufficient to pay the indebtedness claimed by the water company. Nor was

any provision made for the collection of such tax, nor the payment of said indebtedness by such tax. The contention was interposed, by means of the plea of the city, that the lack of the provision by ordinance, or otherwise, for a direct tax to pay the water rentals contended for by the water company was in violation of the provisions of Section 12, Article 9, of the Constitution of Illinois.

We may say then, briefly, that the defenses of the city were, 1. That under the Act of 1891 an ordinance had been passed abrogating the original ordinance establishing the rates in favor of the water company, and 2. The Constitution of Illinois forbade the city to contract as it had done upon the face of the original ordinances. The question is, if the terms of the ordinance passed fixing the rates under which the water company constructed and began the operation of its plant created vested rights, does the abrogating ordinance of 1895 divest such vested rights, and the Constitution of Illinois prevent originally the vesting of such rights? We shall discuss the merits of the first mentioned defense of the city. The city contended that its abrogating ordinance was made valid and legal by the Act of 1895, and that such Act was made valid and legal by Section 9 of the General Incorporation Act of Illinois of April 18, 1872, which provides as follows in said Section 9: "The General Assembly shall at all times have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act." (Starr Curt. Ann. State, 2d Ed., p. 1006.)

It was urged by the city that this general incorporation act was the act under which the water company had its corporate existence, and that subsequent acts of the legislature could operate to allow the city to throw off and discard whatever water rates it was paying to persons or corporations, and fix its own reduced rates. If the terms of this general incorporation act be permitted to reach far enough to permit the legislature at any

time to permit, in its turn, a municipal corporation to throw off the obligations of its existing contracts, then the Darmouth College case can be more easily overruled, and its provisions avoided, than were the statutes of Mortmain, for a season, indirectly avoided by the clergy under the ancient law. Certainly, then, the Darmouth College case must be supported by some legislative enactment as far-reaching and impregnable as Henry VIII.'s Statute of Uses and Trusts. Certainly, then, some such subsequent legislation is necessary to support the weakness of the great Darmouth College case. We may safely grant the power to the Legislature of Illinois to "prescribe such regulations and provisions as it may deem advisable" for all corporations. Does this mean that the legislature shall have power to authorize a municipal corporation to repudiate its contract whenever it is disposed to do so?

No one has ever denied the right of the legislature to impose *police* regulations and other provisions as to administration, taxes, inspection, examination, etc., etc., upon corporations. The legislature has a perfect right to require an individual or a corporation to conform to a multitude of provisions, but it has no right to make any law by which a person or a corporation shall enter upon legitimate business and sell a legitimate commodity for a certain price during a certain term, and then in the midst of the performance of the contract relating thereto, deprive said person or corporation of its *vested, contract rights*. If the court will examine the language of the general incorporation act, above quoted, it will be seen that no right or authority in its language is to be found which confers upon the Legislature of Illinois the right to authorize the City of Danville to repudiate its contract. If this act is in force, then, it is the force which is bound up in the power of the legislature to make provision for the government, police regulation, etc., of corporations in the administration of their affairs in connection with the public health, regulations, morals, and general good, etc. If it does not mean this it can mean nothing, for if it goes beyond this and

touches the sanctity of contracts and vested rights thereunder, it becomes repugnant to the Federal Constitution and falls under the decision in the Darmouth College case.

We have discussed the general incorporation act as a basis for the business validity of the Act of 1895. The Act of 1895, granting the power to the city to fix its own rates in abrogation of its former ordinances and contracts, is certainly in direct violation of the constitution in its guaranteed protection to vested rights. On the same date when the general incorporation act, and Section 9 thereof, went into force (July 1, 1872) there also went into force an Act entitled "An Act to enable cities . . . to contract for and supply all water for public use, and to levy and collect a tax to pay for water so supplied." Sections 1 and 2 of this Act provide, (1) "That in all cities . . . where water-works may hereafter be constructed by an incorporated company, the city . . . authorities in such city . . . may *contract* with such incorporated company for a supply of water for public use for a period not exceeding thirty years." (2) "Any such city . . . so contracting may levy and collect a tax on all taxable property within such city . . . to pay for the water so supplied." (1 Starr Curt. Stat., p. 545.)

It is seen that this last Act went into force and operation on the same date on which the general incorporation act went into force, and the two acts of the General Assembly of Illinois are *in pari materia*, and must be taken and construed together. The water company was organized and incorporated as much under the one act as the other, and its nature, powers, and rights were fixed by both acts. Unmistakably the last quoted act gives the right and power to the city to contract for water for thirty years. It is contended by the city that this relates only to the power of the city in relation to the duration or term of the contract, and does not relate to the *consideration* of the contract. If the power is given to *contract*, then the power to do all things and agree upon all things and provide for all things necessary for a contract must also be given. It would be worse than folly to

say that a city could *contract*, and that it could not have the power to definitely fix and agree upon, and clearly arrange, the *consideration* of its contract and other characteristics of a contract. It is distorting the meaning of the general incorporation act and its companion act to say that reference was had therein only to the period of time for which the city shall bind itself to take water, and that the city is powerless to be definite about the consideration which it is to pay.

If the city can not commit itself on the question of consideration, then it is absolutely cut off from the very power which the legislature is pretending to give it. A person or a corporation deprived of the right of *negotiating* and *fixing* a *consideration*, certainly is deprived of the most important thing in connection with contracting powers. So then we find the law of Illinois at the time of the incorporation of the water company providing two things, and the first of these is—that the legislature shall have the right to impose regulations upon corporations, and the second is—that cities shall have the right to contract for thirty years with corporations for their water supply. In support of its plea to the effect that the water company, at the time of its incorporation, was subject to the control, in its fixed rates or contract prices for water supply, the city has urged that Section 1, Article 10, of the City and Village Act of April 10, 1872, in force July 1, 1872, provided as follows: "The City Council . . . shall have power to provide for a supply of water . . . by the construction and regulation of . . . water-works, and to borrow money therefor, and to authorize any person or private corporation to construct and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years." (1 Starr Curt. Stat., p. 508.)

It was urged that this last named act was *in pari materia* with the act of April 9, 1872, as they both went into effect on the same date, July 1, 1872. The Supreme Court of Illinois construed this City and Village Act as they construed the companion act, that is, that the city council were confined to the term of

thirty years in so far as their powers were concerned in relation to authorizing and empowering persons or corporations to construct and maintain water plants. That court construed the act to mean that the rates were to be fixed from time to time in the future as might suit the convenience, will and wish of the city authorities. This act is certainly capable of a far different construction. It provides that the city shall authorize corporations to construct and maintain water-works for the supply of water to the city at such rates as may be fixed by ordinance. "*At such rates as may be fixed by ordinance*" is entirely in conformity with our contention. We contend that such rates were fixed by ordinance, and that they were here fixed by the original ordinance under which the water company constructed and began the operation of its works.

It is worthy of notice that the word "*ordinance*" in the term "*at such rates as may be fixed by ordinance*" is in the singular. If it had been the intention of the legislature to grant the city power, at various times and on various occasions throughout the future, to fix and refix and unfix rates, the term would have necessarily been "*ordinances.*" There is nothing in this City and Village Act which is out of harmony with our contentions. The Supreme Court of Illinois has said in relation to the City and Village Act that the clause, "*For a period not exceeding thirty years,*" qualifies the words "*construct and maintain the same,*" but does not qualify the words, "*At such rates as may be fixed by ordinance.*" Let us see if such reasoning is sound. What does the word "*and*" beginning the last clause of the quotation from the City and Village Act mean? This word connects not part of, but *all* of what has been said before with the words which follow it, to wit: "*For a period not exceeding thirty years.*" It is certain that there is no break whatever between the words "*construct and maintain the same*" and the words "*at such rates as may be fixed by ordinance,*" and they are certainly a consolidated, unified whole, and any qualifying words which follow will relate to this whole.

If the terms "*Construct and maintain the same*" and "*At such rates as may be fixed by ordinance*" were disjointed or broken in two it might be imagined that the term "*for a period not exceeding thirty years*" would qualify one or the other of the disjoined parts. But such is not the case. They read along together and are absolutely inseparable, being one and the same in a well rounded, concise expression. Quoting from the opinion of the Supreme Court of Illinois on the construction of the terms of the City and Village Act shown above, we find that the Supreme Court says: "In other words, the city council may authorize a private corporation to construct and maintain waterworks for a period not exceeding thirty years, and they may authorize a private corporation to construct and maintain the waterworks at such rates as may from *time to time* be fixed by ordinance." The statute leaves out the terms "*time to time*," but the Supreme Court of Illinois reads them into the statute. We maintain that the water company and the city carried out the statute when they "*fixed by ordinance*" the rates to be charged for water furnished the city. Those rates were not fixed by the will or the caprice of the water company nor by the tacit understanding on the part of the citizens or the authorities of the city, but they were "*fixed by ordinance*," and that ordinance was the original ordinance under which the plant was built and began operation.

The Supreme Court of Illinois said in its opinion, "it (the city) has no authority, even by contract, to control and embarrass its legislative powers and duties." The authorities which we have already cited show that the city did not affect "its *legislative powers*," but that it affected only its *business powers*. It is very true that the council can not affect the future *legislative* powers of the city, but it can affect and can fix its *business* powers. The decision of the Supreme Court of Illinois to which we have just referred is found in 178 Ill. 229, and again in 180 Ill. 235: The two decisions are exactly similar, and relate to the two exactly similar actions in the Circuit Court of Vermilion County by the water company against the city, which two

actions were later, as we have shown above, consolidated, and now in consolidated form are before this Court upon a writ of error.

We shall not discuss at any length the nature of the further defense of the city set up in its plea, contending that no special tax had been provided for the payment of the rates established under the original ordinance and contended for by the water company. The best argument on this point is a display of what the Supreme Crurt of Illinois itself said on this subject.

The decision of the court (178 Ill. 229 and 180 Ill. 235) disposes of this entirely, and it is not a question before this Court.

The cases of the Freeport Water Company v. The City of Freeport and the Rogers Park Water Company v. John B. Fergus, now under submission in this court, contain questions similar to those in this case. To Messrs. George C. Fry and James W. Hyde and their most able brief, as well as to Mr. Newton A. Partridge and his most able brief, we are indebted for a great deal of assistance in the preparation of this brief, and we desire that the court shall consider this case in connection with the Freeport and the Rogers Park cases.

Having closed the statement, contentions, and argument of our case, we respectfully call the Court's attention to our points and authorities.

POINTS AND AUTHORITIES.

Contracts by the authority of the municipality for water to be furnished it and its inhabitants are made, not in the exercise of the governmental powers of the municipality, but of its proprietary or *business* powers, and are governed by the rules applicable to business corporations.

> Little Falls Electric & Water Co. v. Little Falls, 102 Fed. 663.

Illinois Trust & Savings Bank v. City of Arkansas City, 22 C. C. A. 186.
Dill. Mun. Cor. (3d Ed.), § 66 (cases in note).
Safety Insulated Wire & Cable Co. v. Baltimore, 13 C. C. A. 375–8.
San Francisco Gas Co. v. San Francisco, 9 Cal. 453, 468, 469.
Com. v. City of Philadelphia, 132 Pa. St. 288.
New O. Gas Light Co. v. New Orleans, 42 La. Ann. 188.
Tacoma Hotel Co. v. Tacoma Light and W. Co., 3 Wash. St. 316.
Wagner v. City of Rock Island, 146 Ill. 139, 154, 155.
City of Vincennes v. Citizens Gaslight Co., 132 Ind. 114, 126.
Indianapolis v. I. Gaslight, etc., Co., 66 Ind. 396, 400.
Read v. Atlantic City, 49 N. J. Law, 558, 562.
1 Dill. Mun. Corp., §§ 26, 27.
Cincinnati v. Cameron, 33 Ohio St. 336, 367.
Dill. Mun. Corp., § 949.
Weightman v. Washington, 1 Black, 49.

The City of Danville had the power and right to contract by ordinance with the Danville Water Company for water-supply for the public use.

Act of General Assembly of Ill., approved April 9, 1872; in effect July 1, 1872. Starr & Curtis' R. S. Ill., 2d Ed., p. 865.
Act of General Assembly of Illinois, approved April 10, 1872; in effect July 1, 1872. Starr & Curtis' R. S. Ill., Ch. 24, Art. 4, Sec. 1.
1 Dill. Mun. Corp., 3d Ed., Secs. 146, 443.

The Danville Water Company, having accepted the original ordinance with its grants and franchise rights, and having carried out its contract with the city and the public as to the con-

struction and operation of its works and the supplying of water, has a contract protected by the constitutional provisions forbidding the passage of a law impairing the obligation of contracts.

2 Dill. Mun. Corp., Sec. 691.
N. O. Gas Co. v. La. Light Co., 115 U. S. 650.
Louisville Gas Co. v. Citizens Gas Co., 115 U. S. 683.
N. O. Waterworks Co. v. Rivers, 115 U. S. 674.
N. O. W. W. Co. v. St. Tammany W. W. Co., 14 Fed. Rep. 194.
Erie R. R. v. Penn., 153 U. S. 628.
Reagan v. Farmers', etc., Co., 154 U. S. 362.
Walla Walla v. Walla Walla Water Co., 172 U. S. 1.
City of Quincy v. Bull, 106 Ill. 337, 346, 352.
Wagner v. Rock Island, 146 Ill. 139, 153, 158.

A binding contract grows out of a license when the license has been acted upon so extensively and substantially that to revoke it would be unjust.

Gregsten v. Chicago, 145 Ill. 451, 461–8.
Belleville v. Citizens, etc., Co., 152 Ill. 171, 185–6.

When accepted, this legislative grant becomes irrevocable.

Dartmouth College v. Woodward, 4 Wheat. 518.
People v. O'Brien, 111 N. Y. 1.
Fletcher v. Peck, 6 Cranch. 87.
Von Hoffman v. Quincy, 71 U. S. 535.
1 Dill. Mun. Corp., Sec. 53.

Municipal grants and ordinances give rise to the same rights and are subject to the same constitutional prohibitions as other legislative grants.

Williams v. Bruffy, 96 U. S. 176.
N. O. Water W. Co. v. La. Sugar, etc., Co., 125 U. S. 18.
N. O. Water W. Co. v. Rivers, 115 U. S. 674.

St. Tammany, etc., Co. v. N. O. W. W. Co., 120 U. S. 64.
Von. Hoffman v. Quincy, 71 U. S. 535.
4 Thompson on Corps., Secs. 5427–8, 1019.

In enacting the original ordinance and its consistent additional ordinances, the city council had to do with the expediency question, and the courts and subsequent councils must be guided thereby. When the rates are fixed before the acceptance of the ordinance, they become part of the contract and are protected by the Constitution. The expediency of the rates was a legislative matter entirely for the council inducing and contracting with the water company in the original ordinance, and it disposed of such matter by its contracting ordinance. Afterward the question of the existence of expediency is gone, and the question alone of the existence of the contract remains.

Munn v. People, etc., 94 U. S. 113, 133.
Ruggles v. People, etc., 91 Ill. 256, 264.
C., B. & Q. R. R. Co. v. Iowa, 94 U. S. 155.
Peik v. Chicago & Northwestern R. R. Co., 94 U. S. 164, 178.

Whenever the granting of privileges becomes bound by an express or an implied contract to serve the public, such undertaking will support the grant as a contract, no matter how inadequate such contract may be. The legislature having the power to make such grant, the legislative judgment is conclusive both as to the necessity for the grant and the amount of the service to be rendered. The courts have no power to interfere, however inadequate or inexpedient the consideration or unreasonable the grant may appear to them.

Godson v. Winchester, etc., Asso., 12 Bush, 114.
Louisville Gas Co. v. Citizens Gas Light Co., 115 U. S. 700.
Ohio Life Ins. & Trust Co. v. Debolt, 16 How. 428.
N. O. Gas Light Co. v. La. Light, etc., Mfg. Co., 115 U. S. 650.

N. O. Water W. Co. v. Rivers, 115 U. S. 674.
Budd v. State of N. Y., 143 U. S. 517.
Brass v. State of North Dakota, 153 U. S. 391.
N. Y. Lake Erie & W. R. Co. v Penna., 153 U. S. 626.

The constitution forbids any impairment of the obligation of contracts.

Dartmouth College v. Woodward, 4 Wheat. 514.
Bronson v Kinzie, 1 How. 319.
McCracken v Hayward, 2 How. 608.

Any enactment, from whatever source originating, to which the State gives the force of law, is a statute of the State within the meaning of the constitution. The constitution prohibits a State from enforcing an unconstitutional enactment, regardless of the source from which it originated. The ordinance complained of was the equivalent of an enactment of the State.

Williams v. Bruffy, 96 U. S. 176, 183.
N. O. W. Works Co. v. La. Sugar Ref. Co., 125 U. S. 18.
4 Thompson Corp., Secs. 5427–8.

An unconstitutional enactment is not a law, and is as inoperative as if it had never been passed.

Norton v. Shelby Co., 118 U. S. 425, 442.

The ordinance of Jan. 19, 1895, which abrogates the rates fixed by the original ordinances, is void, because it impairs the obligation of the contract between the city and the water company.

N. O. Water Co. v. La. Sugar Ref. Co., 125 U. S. 18.
N. O. Water Co. v. City of N. O., 164 U. S. 481.
City Ry. Co. v. Citizens St. Ry. Co., 166 U. S. 557.
N. O. W. W. Co. v. Rivers, 115 U. S. 674.
St. T. W. Co. v. N. O. W. W. Co., 120 U. S. 64.

The right of *regulation* does not give the council or legislature the right to impair contracts made prior to the regulating

act, unless the contract is prejudicial to public health, peace, morals, or good order.

Stone v. Mississippi, 101 U. S. 814.
Sinking Fund Cases, 99 U. S. 700, 740, 742, 721, 748, 749.
Spring Valley W. W. v. Schottler, 110 U. S. 347.
2 Morawetz Private Corp., Secs. 1101, 1102, 1105, 1112.
Town of Lake v. Rosehill Cem. Co., 70 Ill. 191.
Walla Walla v. Walla Walla W. Co., 172 U. S. 1–15.
1 Dillon Mun. Corp., Sec. 142.
N. O. Gas Co. v. La. Light Co., 115 U. S. 650.
N. O. W. W. Co. v. Rivers, 115 U. S. 674.
R. R. C. v. Maine, 96 U. S. 511.
Santa A. W. Co. v. Santa Buenaventura, 56 Fed. R. 339.

The great weight of authority is that when an express power is given to a municipality to contract or provide for water works, such municipality has the power to contract for fixed rates, and for a definite term.

Atlantic City Works v. Atlantic City, 48 N. J. Law, 378.
Read v. Atlantic City, 49 N. J. Law, 558.
Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480.
Cartersville Gas & Water Co. v. Mayor, 89 Ga. 683.
Grant v. City of Davenport, 36 Ia. 396.
Salena v. City of Neosho, 127 Mo. 627.
State v. City of Phillipsburg, 23 Mont. 16.
Crosby v. City Council of Montgomery, 108 Ala. 498.
City of Greenville v. Greenville Water Works, 27 So. Rep. 764.
City of Indianapolis v. Indianapolis Gas Light & Coke Co., 66 Ind. 396.
City of Connersville v. Connersville Hydraulic Co., 86 Ind. 184.
City of Valparaiso v. Gardner, 97 Ind. 2.

City of Vincennes v. Citizens' Gas Light Co., 132 Ind. 114.

City of Newport v. Newport Light Co., 84 Ky. 168.

New Orleans Gas Light Co. v. The City of New Orleans, 42 La. Ann. 188.

City of Memphis v. Memphis Water Co., 5 Heisk. 529.

Blood v. Manchester Electric Light Co., 68 N. H. 340.

Andrews v. National Foundry, 10 C. C. A. 60.

Kimball v. City of Cedar Rapids, 100 F. R. 802.

Santa Anna Water Co. v. Town of San Buenaventura, 56 F. R. 339.

Fergus Falls Water Co. v. City of Fergus Falls, 65 F. R. 591.

Los Angeles City Water Co. v. City of Los Angeles, 88 F. R. 720.

Los Angeles v. Los Angeles City Water Co., 177 U. S. 558.

Westerly Water Works v. Town of Westerly, 75 F. R. 181.

Defiance Water Co. v. City of Defiance, 90 F. R. 753.

Southwest Missouri Light Co. v. City of Joplin, 101 F. R. 23.

Little Falls Elec. & W. Co. v. City of Little Falls, 102 F. R. 663.

Insulated Water, etc., Co. v. Baltimore, 13 C. C. A. 378.

State ex rel. City of St. Louis v. La Clede Gas Light Co., 102 Mo. 472.

Livingston v. Pippin, 31 Ala. 542.

Rome v. Cabot, 28 Ga. 50.

Hale v. Houghton, 8 Mich. 458.

In re Pryor's Petition, 55 Kas. 724.

State ex rel. v. City of Great Falls, 19 Mont. 518.

Having power to make such contract, the mode and manner is entirely within the discretion of the municipality, so long as

the rates are fixed by ordinance, and the contract does not extend beyond thirty years.

Grant v. City of Davenport, 36 Ia. 390.
City of Portland v. Portland Water Works, 67 Me. 35.
Maine Water Co. v. City of Waterville, 93 Me. 586.
City of New Orleans v. New Orleans Water Works, 36 La. Ann. 432.
Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480.
Utica Water Co. v. City of Utica, 10 Hun, 431.
City of Livingston v. Pippin, 31 Ala. 542.
New Orleans Gas Light Co. v. Louisiana Light Co., 115 U. S. 650.

The legislature having authorized the making of the contract between the city and the water company, it must stand unless attacked for fraud.

Tiedeman on Mun. Cor. 175.
Cooley on Con. Lim. 186-7.
15 Amer. and Eng. Ency. Law, 1046.
New Orleans Water Co. v. New Orleans, 164 U. S. 481.
Little Falls Electric Light Co. v. City of Little Falls, 102 F. R. 663.
Sherlock v. Village of Winnetka, 59. Ill. 389.
Dunham v. Village of Hyde Park, 75 Ill. 371.
Brush v. City of Carbondale, 78 Ill. 74.
Warren v. City of Chicago, 118 Ill. 329.
City of Newport v. Newport Light Co., 84 Ky. 108.
City of Memphis v. Memphis Water Co., 5 Heisk. 529.
Godson v. Winchester, etc., 12 Bush (Ky.), 114.
Von Ripen v. Jersey City, 58 N. J. Law, 262.

Where an ordinance is repealed, such repeal can not operate retrospectively to impair private rights vested under the ordinance.

Dillon on Mun. Cor., Sec. 314.
Thompson on Corporations, Sec. 5413.
Tiedeman on Police Power, Sec. 188.
Sinking Fund Cases, 99 U. S. 700.
Pacific Mail Steamship Co. v. Joleffe, 2 Wall. 450.
Tomlinson v. Jessup, 15 Wall. 454.
Pearsall v. Great Northern R. R. Co., 161 U. S. 673.
Holyoke Water Power Co. v. Lyman, 15 Wall. 500.
Close v. Glenwood Cemetery Co., 107 U. S. 466.
Douglas v. Kentucky, 168 U. S. 488.
Commonwealth v. Essex Co., 13 Gray, 213.

The property rights of the water company having been taken from it by the action of the State under the Act of 1891, and the ordinance of 1895, without any compensation paid therefor, it was deprived of its property without due process of law.

Henderson v. R'y Co., 21 F. R. 358.
Scott v. City of Toledo, 36 F. R. 395.
Baker v. Norwood, 74 F. R. 997.
Davidson v. New Orleans, 96 U. S. 102.
Kentucky R. R. Tax Cases, 115 U. S. 331.
C., B. & Q. R. R. v. Chicago, 166 U. S. 226.
2 Story on Constitution (5th Ed.), p. 676, at pp. 702, 703, Sec. 1956.
1 Hare's American Constitutional Law, 347–8.
Mount Hope Cemetery Co. v. Boston, 158 Mass. 509.
Harness v. C. & O. C. Co., 1 Md. Ch. Dec. 249.
Martin *et al., ex parte*, 8 Eng. (Ark.), 199.
San Diego Land, etc., Co. v. National City, 174 U. S. 749.

The cases relied on by cities and their inhabitants in attempting, under rate-revoking ordinances, to set up the doctrine of public control of corporations which are engaged in serving the public are cases which deal with such control in guarding the public *health, morals, convenience, safety, comfort, and*

status as to police regulations. Those things over which councils and legislative bodies do have a control are things within the scope of the term *police,* and not within the scope of the term *contract.* There is a difference here as wide as the conceptions of the law. Only when contracts are bound up in the operations of corporations which make against good police regulations can the city or the State interfere. The cases cited by counsel for John B. Fergus in the case of Rogers Park Water Company v. John B. Fergus, in the supplemental brief, to establish the right of legislative regulation upon corporations, are this case at bar, when in the Supreme Court of Illinois, and others purporting to sustain it, which are as follows:

N. O. Gas Co. v. La. Light Co., 115 U. S. 650, 672.
R. R. Co. v. Omaha, 170 U. S. 57, 72.
N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659.
Beer Co. v. Mass, 97 U. S. 25.
Stone v. Miss., 101 U. S. 814.

These cases do not bear on this subject of *contracts.* They are all relative to questions of *police.* They all deal with regulations as to *bad odors, threatened public safety, public inebriety, public gaming, etc.* The absolute weight of authority withholds the legislative hand from regulation of the terms of vested contract rights. Such regulation is allowed only when necessary *police* restrictions and duties are to be imposed.

ALEX. POPE HUMPHREY,
W. W. DAVIES,
Attorneys for Plaintiff in Error.

W. W. DAVIES,
Of Counsel.